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No. 78-890

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALVIN GERSON LEVITT and JAMES JOSEPH RILEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1978. A petition for rehearing was denied on November 3, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on Monday, December 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were entitled to an evidentiary hearing to determine whether an application for an order authorizing electronic surveillance of their telephone conversations contained a significant omission concerning

the likelihood of success of alternative investigative techniques.

2. Whether statements contained in the application concerning the availability of alternative investigative techniques were sufficiently detailed to comply with statutory requirements.

STATEMENT

Following a jury-waived trial in the United States District Court for the Central District of California, petitioners and two co-defendants were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner Levitt was sentenced to two years' imprisonment, 20 months of the sentence were suspended and he was placed on probation for five years. Petitioner Riley was sentenced to three years' probation and to pay a $250 fine (Tr. 177-178, 187). The court of appeals affirmed (Pet. App. A).

1. Briefly, the evidence showed that from May until early September of 1975, petitioner Levitt managed a bookmaking operation in the Los Angeles, California, area that employed petitioner Riley and others as agents (Tr. 93-104). In the normal course of business, wagers from bettors were received by telephone at the operation's "front office" and were transmitted to its "back office," where the wagers were recorded and the results of wagering were computed. Those results would be relayed ...ck to the front office, where agents such as petitioner Riley would contact bettors for the purpose of making payments to or collections from them as the result of their wagers (Tr. 104-105). Telephone conversations made in the course of these activities established that on many days during the period in question the operation grossed in excess of $2,000 per day in wagers (Tr. 106-112).

During the investigation of this bookmaking operation, FBI agents applied to a United States District Judge for

authorization to monitor the telephones known to be utilized by the participants (R. 21-28).[1] An affidavit supporting the application stated, *inter alia,* that physical surveillance conducted during the preceding six months had proved fruitless, that government informants had refused to testify even if granted immunity, that searches of petitioner Levitt's records had been unproductive, that telephone toll records were also unproductive as an evidentiary source, and that the enlistment of bettors as informants was unlikely to be productive because lower echelon employees would insulate the bettors from Levitt (Pet. App. A-2 to A-3; R. 48-57). Following issuance of the surveillance order, investigative agents intercepted conversations of both petitioners (R. 103, 113, 126).

2. At trial, petitioners moved to suppress the contents of the intercepted conversations. In connection with the motion, petitioner Levitt sought to present the testimony of several FBI agents to demonstrate that the surveillance application contained a material omission concerning the availability of alternative investigative procedures and, hence, did not comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[2] Levitt claimed the agents would testify that, in addition to the four confidential informants mentioned in the affidavit supporting the surveillance application, the government was also obtaining information from Charles Millikan, a back office clerk in the operation. The omission of this

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[1] "R." refers to the clerk's transcript, a copy of which is being lodged with the Clerk of this Court.

[2] 18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

information from the affidavit, Levitt urged, undermined the basis of the authorizing judge's determination that normal investigative techniques were likely to be fruitless. The trial judge refused to entertain the proffered testimony and denied the suppression motion (Tr. 66-70). Transcriptions of the intercepted calls were subsequently admitted into evidence (Tr. 115-117, GX 2).

ARGUMENT

1. Relying on *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), petitioners contend (Pet. 4, 6-9) that their allegation of a material omission in the affidavit entitled them to an evidentiary hearing on the sufficiency of the government's application for the surveillance order. *Franks*, however, does not support their claim. In *Franks*, this Court required that an evidentiary hearing be held if "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause" (slip op. 1).

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(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *.

Petitioners have met neither of these requirements.[3] First, they have failed to present any facts suggesting that the alleged omission was the result of deliberate falsehood or reckless disregard for the truth. Although they allege "a material omission" (Pet. 6), the Court emphasized in *Franks* (slip op. 17) that, even when a misstatement is material, "[a]llegations of negligence or innocent mistake are insufficient" to require a hearing. Second, they have not demonstrated that the omission involved was truly material, since they have not shown that the disclosure of Millikan as a source of information would have led the district judge to refuse to issue the intercept order on the ground that alternative investigatory techniques were sufficient. See *United States* v. *Santarpio*, 560 F. 2d 448, 453 n.4 (1st Cir. 1977).

As the trial judge properly observed (Tr. 66-68), under the federal gambling statute it was essential not only to connect petitioners to the operation, but also to establish that the operation involved five or more persons and that it either remained in continuous operation in excess of 30 days or had a gross revenue of $2,000 in any single day. See 18 U.S.C. 1955(b)(1). While the offer of proof averred the existence of an informant whose involvement was not disclosed in the agent's affidavit,[4] it did not show that information supplied by the informant would have satisfied these crucial evidentiary requirements or that, in contrast to his anonymous counterparts, Millikan would have been willing to testify or would have been granted

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[3]We note further that *Franks* dealt with the constitutional requirement of a showing of probable cause to support a search warrant, while this case involves a statutory requirement unrelated to probable cause.

[4]An affidavit executed by petitioner Levitt accompanied his written motion. It averred, *inter alia*, that "Charles Milligan" (sic) was employed by him, knew the names of other employees, and maintained records for him (R. 13-14).

immunity by the government.[5] Hence, the proffer did not demonstrate that Millikan's availability to supply information about the operation constituted an adequate substitute for electronic surveillance. Consequently, disclosure of his existence would not have affected the issuing judge's determination that alternative investigative techniques were inadequate, particularly since the telephone was the principal vehicle for conducting the ongoing criminal operation. See *United States* v. *Santarpio, supra,* 560 F. 2d at 452.

2. Petitioners also claim (Pet. 9-12) that the surveillance application failed to comply with the requirements of Title III because it did not explain the reasons why traditional techniques were insufficient to investigate the gambling operation. As the court below recognized (Pet. App. A-2 to A-3), the extensive affidavit supporting the surveillance application not only enumerated alternative techniques that had been attempted or considered, but also provided detailed explanations why, in this particular case, such techniques had either failed or probably would prove fruitless. For example, it explained that while some information was available from confidential sources, those sources were afraid to testify even if immunized and given protective custody (R. 48); that surveillance had been attempted but was frustrated by precautions taken by the subjects (R. 49-50); that review of telephone toll records was fruitless since calls made from the suspects' telephones were to toll-free telephone numbers (R. 53-54); that previous search warrants executed on petitioner Levitt's papers did

[5]The affidavit accompanying the surveillance application stated that "[t]he only witnesses who could provide evidence to the grand jury pertaining to the illegal gambling business are the subjects of the investigation themselves and a handful of suspected bettors. In view of the fact that the subjects face criminal prosecution it is not likely that they would voluntarily testify" (R. 57).

not result in seizure of meaningful evidence (R. 54-55); that the use of bettors as informants would be fruitless since such persons would come into contact only with lower echelon employees of the operation (R. 51-52, 55-56); and that Levitt's hiring practices made it virtually impossible for an infiltrator to obtain employment in the operation (R. 52-53). These detailed explanations place this application in marked contrast with that considered in *United States* v. *Kalustian,* 529 F. 2d 585 (9th Cir. 1975), upon which petitioners rely.[6]

[6]In *United States* v. *Spagnuolo,* 549 F. 2d 705, 709-710 (9th Cir. 1977), the court recognized that its circuit's decisions in this area "often lead to results difficult to harmonize," but concluded that the appropriate standard is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. * * * An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with Section 2518(1)(c). *Kalustian* teaches no more than that." The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. In any event, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions alleged to be in conflict with *Kalustian.* See, *e.g., United States* v. *Berlin,* 559 F. 2d 1215 (5th Cir.), cert. denied, 434 U.S. 1012 (1977); *United States* v. *Scully,* 546 F. 2d 255 (9th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *United States* v. *Kirk,* 534 F. 2d 1262 (8th Cir. 1976), cert. denied, 433 U.S. 907 (1977). Nothing has happened recently to justify any change in this Court's refusal to review what is fundamentally an intra-circuit conflict. Cf. *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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